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No. 99-1838

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

KNIGHTS OF THE KU KLUX KLAN, Realm of Missouri, and Michael Cuffley,

Petitioners,

v.

CURATORS OF THE UNIVERSITY OF MISSOURI; Patricia Bennett, in her official capacity as general manager of KWMU Radio only; Theodore C. Beckett, in his official capacity as Curator of the University of Missouri; Paul T. Combs, in his official capacity as Curator of the University of Missouri; Adam B. Fischer, in his official capacity as Curator of the University of Missouri; Mary S. Gillespie, in her official capacity as Curator of the University of Missouri; Fred L. Hall, Jr., in his official capacity as Curator of the University of Missouri; Malaika B. Horne, Dr., in her official capacity as Curator of the University of Missouri; John A. Mathes, in his official capacity as Curator of the University of Missouri; Paul W. Steele, in his official capacity as Curator of the University of Missouri; Hugh E. Stephenson, Jr., Dr., in his official capacity as Curator of the University of Missouri,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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The Ku Klux Klan has been denied a benefit routinely granted to others similarly situated, solely because Respondents fear negative public reaction to the Klan's' identity and viewpoint. Whether analyzed by the theories applicable to public forums or unconstitutional conditions precedent to receipt of governmental benefits[1], this blatant viewpoint discrimination presents an important issue of Constitutional law.[2]

Appellants do not demand access to Respondents' airwaves where none has been previously allowed. Respondents routinely allow public access to their airwaves and exclude only the Klan's message. Appellants desire to be treated the same as all similarly situated groups without regard to their identity and the exercise of their First Amendment freedoms. Respondents' reliance on *CBS v. DNC*, 412 U.S. 94 (1974)[3] and *Muir v. Alabama*

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[1] Respondents' allegation that Petitioners "failed to include any allegation that underwriting announcements are 'public governmental benefits'" is without merit because it ignores the liberal notice pleading rules inherent in Federal Rules of Civil Procedure, Rule 8(a), and Petitioners' allegation in paragraph 20 of their first amended complaint, reproduced in Respondents' Brief in Opposition at App. 5, stating that "petitioners have suffered irreparable harm by denial and deprivation of their rights under the First and Fourteenth Amendments to the United States Constitution by being denied participation as underwriters with the accompanying on-air announcements." Petitioners' unconstitutional conditions theory was argued to both the District And Appellate Courts.

[2] "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *U.S. v. Eichman*, 496 U.S. 310,319, 110 S.Ct. 2404,2410, 110 L.Ed.2d 287 (1990).

[3] *CBS v. DNC*, held that the FCC could not require a broadcaster to accept editorial advertisements where the station had refused all editorial advertisements as a matter of policy. The case did not involve

Educational Television Commission, 688 F.2d 1033 (5th Cir. 1982)[4] is misplaced.

Respondents' routine sale[5] of thousands of broadcast messages to hundreds of private individuals and groups unequivocally establishes their intention to designate a portion of their airwaves for the broadcast of private speech. The broadcast announcements are the speech of the underwriter,[6] despite being subject to some form and content limitations.[7]

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a public forum. Also, CBS is a private entity and has no obligations to the public under the First Amendment.

[4] In *Muir*, the Fifth Circuit held that the public broadcaster could not be required by members of the public to broadcast a program it had rejected as unsuitable. *Muir* was not a public forum case, since the station had not opened its airwaves to the broadcast of private messages, as KWMU has done in the instant case.

[5] KWMU cries foul when its underwriting activities are described as "sales", despite its employment of a sales paradigm internally. KWMU employ "sales managers" and "sales associates" for the purpose of selling underwriting announcements. Transcript p. 12. The broadcast announcements are provided to speakers in exchange for "bargained-for" consideration. Sales associates are awarded an incentive or bonus based upon the total amount sales. Transcript pp. 37 -- 38.

[6] See the admission made by Patricia Bennett, general manager of KWMU that the speech in the broadcast announcement is the speech of the underwriters and not the speech of the radio station.

> THE COURT: This is something we've gone through, I think now, twenty-eight times, if you look at all the exhibits. None of these [underwriting announcements] are KWMU's message. They are all messages from the company, or the organization, the entity that they're reading on behalf of that entity. [sic] .
>
> HERMAN: That's precisely my point, your honor.
>
> THE COURT: Is that true? I don't want to put words in your mouth.
>
> BENNETT: No. That's correct.

Patricia Bennett, General Manager of KWMU, transcript p. 73-4.

[7] Respondents make much of their exclusion of underwriting announcements from an illegal business and the "Ultimate Fighting Championship." Both are legitimate exercises of content discrimination within a public forum and do not justify the viewpoint discrimination exercised in the instant case.

Respondents brandish *Arkansas Educational Television v. Forbes*, 523 U.S. 666, 118 S.Ct. 1633 (1998) as a talisman to ward off application of the public forum doctrine to public broadcasting in all cases except election debates. *Forbes*' *dicta* that public broadcasting stations, "as a general matter" will not be subject to public forum analysis, does not support Respondents' contentions that all speech broadcast on publicly owned stations is the government's editorial speech or that the public forum doctrine is never applicable to public broadcasting, except for election debates.

Respondents routinely broadcast thousands of announcements from hundreds of different private individuals and groups. They cannot hide behind the veil of *Forbes* and insist that their designation of public access to their airwaves cannot be considered. *Forbes* did not establish public broadcasting as a "Constitution free preserve."

Respondents claim "editorial discretion" as the basis for the Klan's exclusion. They do not identify the Constitutional basis for such privilege. The First Amendment does not protect the State's speech.

Dressing up their argument in terms of potential lost revenue does not negate the inherent viewpoint-based discrimination. "The existence of reasonable grounds for limiting access to a non-public forum, however, will not save a regulation that is in reality a façade for viewpoint bases discrimination." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 105 S.Ct. 3439, 3453, 87 L.Ed.2d 567 (1985). When the public broadcaster has, by its own actions, affirmatively created a non-public forum, "the requirement of neutrality remains...." *Forbes*, 118 S.Ct. at 1640.

The State's argument is thus reduced to whether anticipated negative public reaction is an important government goal that must be protected at the expense of a citizens' First Amendment rights. Even if Respondents

require editorial discretion for the proper functioning of their proprietary broadcast function, they are not entitled to exercise their discretion in a manner that punishes the exercise of Constitutionally protected rights. See, *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), (allocation of public contracts) *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (allocation of public benefits).

Respondents attack the First Amendment as a problem in syntax. They suggest that if their sale of airtime is transmuted into an "acknowledgement of a gift", and their selection of politically acceptable speakers is seen as their own speech, then the First Amendment rights of the unpopular and inconvenient will fade away. Such an Orwellian exercise in "new-think" cannot be allowed to undermine the protection afforded by the First Amendment nor should it detract our attention from the danger created by Respondents' viewpoint discrimination.

Appellants broadcast announcement would have been allowed, but for their offensive identity and viewpoint. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-649, 104 S.Ct. 3262, 3266-3267, 82 L.Ed.2d 487 (1984)."When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995).

Appellants' Writ of Certiorari should be granted by this Court with an accompanying order of Summary Reversal.

Respectfully submitted,

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